UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: March 10, 2003

Opposition No. 91150888

NUMICO FINANCIAL SERVICES, S.A.[1]

v.

WALLACH, JOEL, D. DR.

David Mermelstein, Attorney:

This proceeding now comes up on opposer's motion to compel, filed November 1, 2002, and applicant's motion for judgment under Trademark Rule 2.132(a), filed December 12, 2002.

Under the current trial schedule, set by the Board when this proceeding was instituted, discovery closed on September 11, 2002. Opposer's testimony period for its case-in-chief closed on December 10, 2002.

Accordingly, opposer's motion to compel discovery was timely, having been filed prior to the opening of the first testimony period. The Trademark Rules provide that

> When a party files a motion for an order to compel discovery, the case will be suspended by the Trademark Trial and Appeal Board with respect to all matters not

[1] The Board has previously identified opposer as Rexall Sundown, Inc. However, the records of the Assignments Branch of the USPTO indicate that opposer's pleaded registration was assigned to Numico Financial Services, S.A., prior to institution of the opposition. The Board regrets any confusion.

> germane to the motion, and no party should file any paper which is not germane to the motion, except as otherwise specified in the Board's suspension order. The filing of a motion to compel shall not toll the time for a party to respond to any outstanding discovery requests or to appear for any noticed discovery deposition.

Trademark Rule 2.120(e)(2)(emphasis added). Accordingly, this proceeding is considered SUSPENDED *nunc pro tunc* to the timely filing of opposer's motion to compel. Because the matter is suspended, opposer's testimony period never opened and applicant's motion for judgment is denied as moot.

Turning next to opposer's motion to compel, we note that applicant has not filed a response to the motion. When the above Board attorney took up the file in this matter to consider the outstanding matters, applicant's motion to dismiss was not part of the record. However, since opposer had responded to the motion, the Board contacted applicant's counsel to confirm whether such a paper had been filed and, if so, to request another copy.[2] Applicant's counsel confirmed that it had not filed an opposition to the motion to compel. Although not asked, applicant's counsel further indicated that applicant had subsequently responded to opposer's discovery requests.

The Trademark Rules provide that if issues pending in a motion to compel are resolved, the movant should so inform

[2] Applicant's counsel faxed a copy of the motion for judgment to the Board.

the Board in writing. Trademark Rule 2.120(e)(1). The Rules likewise provide that an opposition to a motion must generally be filed no later than fifteen days from service of the motion (plus time allowed for service pursuant to Trademark Rule 2.119(c)), and that if no opposition is filed, the motion may be granted as conceded. Trademark Rule 2.127(a).

We are unable to treat applicant's comment to this Board attorney that applicant has fully responded to opposer's discovery requests. First, the comment was made in an *ex parte* conversation initiated for the purpose of determining whether the Board's file in this matter was complete. Opposer has not had the opportunity to hear or respond to applicant's remark. Second, applicant's comment comes long after response to the motion was due, and is therefore untimely.

Third, and finally, applicant's alleged discovery responses may not have resolved the issue. The responses may not have been adequate in opposer's view. Applicant may have interposed objections which would otherwise be considered waived in view of its late responses. Indeed, opposer may even deny having received applicant's discovery responses. The problem is that without a written opposition to the motion, the Board will not guess at what opposer's position would be.

We are presented here with an unopposed motion to compel discovery. Opposer has not withdrawn the motion, and applicant has not filed an opposition thereto. The motion is accordingly GRANTED as conceded. Trademark Rule 2.127(a).

Applicant is allowed until THIRTY DAYS from the mailing date of this order in which to fully respond to opposer's discovery requests alleged to be deficient in opposer's motion to compel.

Trial dates are reset[3] as follows:

DISCOVERY PERIOD TO CLOSE:	**CLOSED**
Thirty day testimony period for party in position of plaintiff to close:	**June 8, 2003**
Thirty day testimony period for party in position of defendant to close:	**August 7, 2003**
Fifteen day rebuttal testimony period to close:	**September 21, 2003**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

[3] As part of its motion to compel, opposer requested a reopening of discovery. Opposer's motion is DENIED. Opposer did not serve its interrogatories and requests for the production of documents until four months after the opening of discovery. Once served, opposer waited until four months after responses were due – until well after the close of discovery – to file its motion to compel. Opposer has not shown excusable neglect for its failure to pursue discovery at an earlier date, or to timely move to extend its discovery period. Fed. R. Civ. P. 6(b).

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

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